Explanation of Record References.

The record before this Court returned by the Clerk of the Court of Appeals for the Tenth Circuit consists of the following items and record references will be made as indicated.

		Record References
1.	Printed Volume I — Motion for Leave to File Petition; Petition for Mandamus; Memorandum of Points and Authorities in Support of Petition; and Order to Show Cause.	(Vol. I p. ....)
2.	Printed Volume II — Appendix to Petition for Writ of Mandamus.	(Vol. II p. ....)
3.	Printed Volume III — Supplemental Appendix to Petition for Writ of Mandamus.	(Vol. III p. ....)
4.	Typewritten Motion to Dismiss filed by Respondent below, Honorable Stephen S. Chandler.	(Res. Motn. p. ....)
5.	Petitioner's Reply Brief filed by Petitioner below, Texaco Inc.	(Pet. R. Br. p. ....)
6.	Waiver of Oral Argument and Rejoinder filed by Respondent below, Honorable Stephen S. Chandler.	(Res. Rej. p. ....)
7.	Transcript of Proceedings before the United States Court of Appeals for the Tenth Circuit filed with the Clerk thereof, July 14, 1965.	(Tr. C.A. 10 p. ....)
8.	Statement of Petitioner below concerning *Rapp v. Van Dusen* and Companion Cases filed by Petitioner below, Texaco Inc.	(Stmt. Pet. p. ....)
9.	Opinion and Order of the United States Court of Appeals for the Tenth Circuit filed with the Clerk thereof, December 27, 1965. This is printed in the Appendix to the Petition here and reference will be made to such Appendix.	(Pet. App. p. ....)
	The Petition for a Writ of Certiorari here is referred to thusly.	(Pet. p. ....)

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IN THE

Supreme Court of the United States

October Term, 1965
No. 925

STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,

Petitioner,

vs.

TEXACO INC., a Delaware Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF FOR RESPONDENT TEXACO INC. IN OPPOSITION.

Questions Presented.

As shown in the Counter-Statement of the Case, *infra*, the questions presented by Petitioner are not properly predicated on the facts in this case. In addition, some of the questions refer to the action of the Judicial Council of the Tenth Circuit of the United States in a proceeding which is not related to this petition and which now appears moot.[1]

[1]On February 10, 1966, the New York Times reported that the Solicitor General has informed the Court that Petitioner in Case, 1, 111 Misc. had agreed not to contest the modified order of the Judicial Council of the Tenth Circuit issued on February 4, 1966.

The questions presented by the decision of the United States Court of Appeals for the Tenth Circuit are:

(1) Whether the failure of Petitioner to disqualify himself, in accordance with the provisions of 28 U.S.C. §455, in an action pending before him involving respondent where counsel for respondent's opponent is contemporaneously representing Petitioner in an action against Petitioner for damages, is a clear abuse of discretion for which mandamus is the appropriate remedy.

(2) Whether the United States Court of Appeals for the Tenth Circuit abused its discretion under the All Writs Act, 28 U.S.C. §1651, in ordering Petitioner to proceed no further in the case involving respondent and that all further proceedings in that case be heard and determined by a judge to be designated by the Chief Judge of the United States Court of Appeals for the Tenth Circuit.[2]

Statutes Involved.

The only statutes involved are 28 U.S.C. §455 and 28 U.S.C. §1651.[3]

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[2]On December 31, 1965 the Tenth Circuit assigned the case below (*Hirschfield, et al. v. Texaco Inc.*) to the Honorable Luther B. Eubanks, United States District Judge for the Western District of Oklahoma.

[3]28 U.S.C. § 455 provides:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

28 U.S.C. § 1651 provides:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Counter-Statement of the Case.

On June 6, 1964, a complaint was filed in the United States District Court for the Western District of Oklahoma (*Hirschfield, et al. v. Texaco Inc.*) wherein plaintiffs seek a judgment against respondent Texaco Inc. in the amount of $25,000,000.00 for alleged services rendered. (Vol. II pp. 1-4.) The case was assigned to Petitioner.

On August 14, 1964, Texaco Inc. filed a motion to transfer the case to the United States District Court for the Southern District of Texas, Houston Division. (Vol. II pp. 31-40.) Finally, on October 26, 1964, Petitioner ordered that the motion to transfer be stayed until the pretrial conference. (Vol. II p. 203.) Thereafter, on November 5, 1964, Texaco Inc. renewed its motion for transfer. (Vol. II pp. 99-100.) On December 1, 1964, Petitioner again deferred a decision on the motion to transfer. (Vol. II p. 103.) On January 26, 1965, Texaco Inc. again renewed the motion to transfer. (Vol. II pp. 104-107.) For the third time, on March 1, 1965, Petitioner ruled that the motion to transfer would not be heard until final pretrial. (Vol. II p. 125.)

On April 23, 1965, after it had taken depositions, (Vol. II pp. 204, 205) Texaco Inc. filed a motion for summary judgment together with a motion to stay all further proceedings pending the hearing and disposition of the motion for summary judgment. (Vol. II p. 126.) After agreement of counsel, on April 30, 1965, Petitioner granted Texaco Inc.'s motion to stay all other proceedings, except the motion for summary judgment. (Vol. II pp. 168, 169.)

In *Hirschfield et al. v. Texaco Inc.*, plaintiff's counsel is John H. Cantrell, Esq., of Oklahoma City, Oklahoma. Mr. Cantrell still is attorney of record for plaintiffs in the *Hirschfield* case. Mr. Cantrell signed all the pleadings and personally appeared at all hearings in the case before Petitioner. (See, for example, Vol. II pp. 4, 26, 29, 41, 58, 61, 102, 120, 124, etc.)

During the time Mr. Cantrell represented plaintiffs in *Hirschfield,* he was also leading counsel representing Petitioner in *W. H. Pat O'Bryan v. Stephen S. Chandler*. The *O'Bryan* case was filed on September 25, 1963 in the District Court of Oklahoma County, State of Oklahoma, and thereafter removed to the United States District Court for the Western District of Oklahoma. In his petition, W. H. Pat O'Bryan alleged two causes of action—one for actual damages in the sum of $5,000,000.00 and the other for punitive damages in the sum of $5,000,000.00.[4]

Proceedings in the *O'Bryan* case were had before Judge Roy W. Harper, Chief Judge of the United States District Court for the Eastern District of Missouri, Eastern Division, who was designated and assigned as the judge to sit on and try the case. Mr. Cantrell, with

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[4]As the Tenth Circuit found (Pet. App. pp. ii-iii), ". . . that at the time the [Hirschfield] action was filed there was pending in the same court an action wherein W. H. Pat O'Bryan sought to recover damages in the sum of $10,000,000 alleged to have been caused by the misconduct of Judge Chandler before a federal grand jury which returned an indictment charging O'Bryan with a felony; that in the damage action alleging Judge Chandler to be guilty of malicious prosecution, libel and slander, he was represented by five attorneys headed by John M. Cantrell, an Oklahoma attorney; that Mr. Cantrell was one of the attorneys representing the plaintiffs in the aforesaid Texaco suit; and that Mr. Cantrell continued to represent Judge Chandler in the O'Bryan case until after perfection of an appeal. . . ." (footnote omitted)

four other attorneys of the Oklahoma State Bar, appeared as counsel for Petitioner. Mr. Cantrell assumed major responsibility for Petitioner's defense in all court hearings.[5] (Vol. I p. 14)

O'Bryan v. Chandler was dismissed by Judge Harper on July 1, 1964. O'Bryan appealed to the United States Court of Appeals for the Tenth Circuit. The designated transcript of record was certified by the Clerk of the District Court on September 2, 1964, filed in the Office of the Clerk of the Court of Appeals on October 2, 1964, and the case was docketed in the Court of Appeals on October 4, 1964. (Vol. I p. 15.) Mr. Cantrell noted his appearance on behalf of Judge Chandler in the appeal and again took a leading role on appeal until the argument which was heard by the Tenth Circuit en banc on the same day as the argument in this case, August 18, 1965. It was not until after Texaco's Petition for writ of mandamus was filed with the Court of Appeals, May 28, 1965, that Mr. Cantrell (on June 6, 1965) withdrew as counsel for Judge Chandler in the appeal in the *O'Bryan* case. The dismissal of the *O'Bryan* case on the grounds that Petitioner was immune from civil liability for the alleged acts of misconduct was affirmed by the Tenth Circuit on November 30, 1965. *O'Bryan v. Chandler,* 352 F. 2d 987 (10th Cir. 1965).

After the complaint was filed in *Hirschfield, et al. v. Texaco,* on several occasions from June 6, 1964 to

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[5]From the beginning, the case of *O'Bryan v. Chandler* received an unusual amount of publicity and its outcome was of more than ordinary importance to the parties and counsel involved. It was characterized by Petitioner of "great importance to the federal judiciary, to the judiciary in the Nation as a whole and to this defendant * * *." (Vol. I, p. 15)

May 5, 1965, Petitioner on his own initiative stated that he would prefer not to try the *Hirschfield* case and would prefer to assign or transfer it to another judge. It was assumed by counsel for respondent that Petitioner would eventually assign or transfer the *Hirschfield* case to another judge for further proceedings and trial. [Affidavit of Phil E. Daugherty, Exhibit A, Pet. R. Br.] The first decision of the Court of Appeals for the Third Circuit construing 28 U.S.C. §455 was not published. [Counsel for respondent later learned that it had been reargued on May 26, 1965. (Stmt. Pet. p. 2.) The first decision was later reiterated *Rapp v. Van Dusen,* 350 F. 2d 806 (3rd Cir. 1965).] Even so, in light of the unpublished decision, on May 5, 1965, counsel for respondent requested, and counsel for the parties conferred with Petitioner, and respondent informally requested that Petitioner disqualify himself as Judge in the *Hirschfield* case. Petitioner declined to make any decision.[6] (Vol. III p. 24, pp. 34-35, Vol. II pp. 179-181.)

Thereafter, on May 10, 1965, Respondent filed a formal application requesting Petitioner to disqualify himself in the *Hirschfield* case under 28 U.S.C. §455 and seeking the appointment, assignment or designation by the Chief Judge of the Court of Appeals of another judge for further proceedings, pursuant to the provisions of 28 U.S.C. §292(b). At the same time, counsel for respondent requested Petitioner to sign an order granting a stay of *all* proceedings (which would

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[6]Petitioner's claim that he had made "important rulings, some of which were unfavorable to Texaco" (Pet. p. 5) is unsupported. Other than to defer rulings for later disposition, the only substantive ruling related to plaintiff's interrogatories and this was disposed of by agreement of the parties. Even the partial stay was by agreement of the parties.

have included a stay of respondent's motion for summary judgment) pending the decision on the application for disqualification. (Vol. II pp. 170-178.) Again, Petitioner declined to act on the pending motions.[7] (Vol. III pp. 5-19.)

On May 19, 1965, at the request of respondent, a formal conference was held before Petitioner. (Vol. III.) All parties appeared and a court reporter was present. After considerable discussion and argument, Petitioner still was unwilling to act either on respondent's request for a stay of all proceedings or on respondent's application to disqualify. (Vol. III.) Thereafter, on May 28, 1965, respondent filed its Motion for Leave to File Petition and its Petition for a Writ of Mandamus ordering and directing Petitioner not to sit on and to proceed no further in *Hirschfield v. Texaco* and that another judge be designated by the Chief Judge of the Court of Appeals pursuant to 28 U.S.C. 292(b). (Vol. I.)

In response to Texaco's petition for a writ of mandamus in the Tenth Circuit, Petitioner filed a motion to dismiss, seeking to have the order granting leave to file a petition for writ of mandamus set aside and the proceedings dismissed, or, in the alternative, that the stay order entered *ex parte* by the Tenth Circuit "be set aside in order that Respondent may hear and rule on Petitioner's Motion for Disqualification at 9:00 A.M., June 28, 1965, without the necessity of further notice to counsel of said hearing." (Res. Motn. p. 13.)

On the day scheduled for a hearing on respondent's petition for a writ of mandamus, Respondent filed in

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[7]Thus, contrary to the impression given by the petition at page 7, the entire proceedings were not stayed.

the Court of Appeals a Waiver of Oral Argument and Rejoinder in which he waived oral argument but sought leave to have a court reporter record the hearing, "In order to provide opportunity for correction of mis-statement, if others there should be, by written statement before final decision." (Res. Rej. p. 1.) The Court of Appeals concluded that, "To permit Judge Chandler at this time to waive oral argument but reserve the right to have a report made of the oral argument on the other side and have it transcribed and permit him, in effect, to reply to it in writing at some later date would be inconsistent with his expressed waiver. It wouldn't be fair to permit that to be done in our judgment." The Court of Appeals reset the case for oral argument at the August, 1965 session of the Court and stated: "* * * if Judge Chandler is so advised, he may withdraw his waiver of oral argument and appear in person or by counsel and present oral argument in response. . . ." (Tr. C.A. 10, pp. 3-4.) Oral argument was heard on August 18, 1965, and Petitioner was represented by Counsel. The decision and order of the Court of Appeals was thereafter filed on December 27, 1965.

ARGUMENT.

Petitioner's Refusal to Disqualify Himself Under the Circumstances Is a Clear Abuse of Discretion for Which Mandamus Will Lie.

The propriety of Petitioner continuing to sit in a case where counsel for plaintiffs is as closely connected to Petitioner, as Mr. Cantrell in representating Judge Chandler in the *O'Bryan* case, *supra,* is not only a matter of statute (28 U.S.C. §455), but also involves the basic and elementary right of a litigant to the appearance of detached impartiality.

Federal and State courts are all in accord with this proposition. As recently stated by the Fifth Circuit in *Pillsbury Co. v. FTC,* decided January 7, 1966, ... F. 2d ....., in vacating an administrative order, the appearance of impartiality is ". . . the sine qua non of American judicial justice . . ."

This proposition is also embodied in Canon 13 of Canons of Judicial Ethics adopted by the American Bar Association which provides:

> "A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person."

Judges have disqualified themselves to preserve impartial judicial appearance, even though they believed they were not required to do so under the law and in spite of their belief that they could render an impartial decision, *e.g., United States v. Quattrone,* 149 F. Supp. 240 (D.D.C. 1957); *United States v. Valenti,* 120 F. Supp. 80 (D.N.J. 1954).

The Third Circuit decision in *Rapp v. Van Dusen,* 350 F. 2d 806 (1965), cited by the Tenth Circuit in the case below clearly reflects the need for the appearance of complete impartiality. The *ratio decidendi* of the *Rapp* case is particularly applicable here. As stated by the Third Circuit (350 F. 2d at 812):

> "For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality . . ."

Significantly, in *Rapp* the judge was only a nominal party with absolutely no personal interest in the action, whereas here Petitioner was the defendant in an action seeking a personal judgment. Thus, there was a more compelling reason for Petitioner to disqualify himself and thereby preserve the appearance of detached impartiality. Petitioner's failure to disqualify himself after being informally requested as a result of his existing connection with plaintiff's counsel in the *Hirschfield* case is a clear abuse of discretion. Petitioner's action removed the appearance of detached impartiality from the trial of the *Hirschfield* case and clouded the appearance of fair judicial administration. Petitioner had no vested right to sit in the *Hirschfield* case, and his continued refusal to disqualify himself made action by the Tenth Circuit mandatory to preserve the appearance of fair judicial administration within the Tenth Circuit. Under these circumstances, mandamus is proper to remedy a clear abuse of discretion.[8]

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[8]Petitioner's assertion that respondent is not entitled to protection afforded by Section 455, *supra,* because Petitioner was not given an opportunity to rule on the motion to disqualify (Pet. p. 20) is not only inaccurate but again misses the purpose of Section 455. On three separate occasions, Petitioner was requested to disqualify himself and refused to rule. At the same time, the case was continuing before Petitioner as a result of Petitioner's refusal to completely stay the proceedings.

The Tenth Circuit Did Not Abuse Its Discretion by Reassigning the Hirschfield Case to Another Judge in the Western District of Oklahoma.

There is no serious question that the Tenth Circuit has the power to issue prerogative writs in the aid of its appellate jurisdiction under the provisions of 28 U.S.C. § 1651. In *La Buy v. Howes Leather Co.*, 352 U.S. 249, this Court held (352 U.S. at pp. 254-255):

> ". . . petitioner urges that such action can be reviewed only on appeal and not by writ of mandamus, since by congressional enactment appellate review of a District Court's orders may be had only after a final judgment. The question of naked power has long been settled by this Court. As late as Roche v. Evaporated Milk Association, 1943, 319 U.S. 21, 25, 63 S. Ct. 938, 941, 87 L. Ed. 1185, Mr. Chief Justice Stone reviewed the decisions and, in considering the power of Courts of Appeals to issue writs of mandamus, *the Court held that 'the common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court.'* The recodification of the All Writs Act in 1948, which consolidated old §§ 342 and 377 into the present § 1651(a), did not affect the power of the Courts of Appeals to issue writs of mandamus in aid of jurisdiction. [Citation omitted] Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them." (Emphasis added.)

This power extends not only to circumstances where there is a clear abuse of discretion but also in connec-

tion with the "supervisory control of the District Courts by the Court of Appeals [which] is necessary to proper judicial administration in the federal system." *La Buy v. Howes Leather Co., supra,* at pages 259-260. As shown above, petitioner's refusal to disqualify himself under the circumstances presented was a clear abuse of discretion requiring the Tenth Circuit to exercise its discretion under 28 U.S.C. § 1651. Since petitioner had no vested right to try the *Hirschfield* case, the Tenth Circuit clearly acted properly when it reassigned this case to another district judge in the Western District of Oklahoma in order to preserve the appearance of fair judicial administration within the Tenth Circuit.

• This Court has twice refused to grant certiorari to the Court of Appeals for the Tenth Circuit when it, asserting jurisdiction under 28 U.S.C. §1651, or under its inherent power of appellate jurisdiction, over a District Court Judge to proceed no further in an action pending before him. *U.S. v. Ritter,* 273 F. 2d 30, 32, cert. den. 362 U.S. 950, and *Occidental Petroleum Corp. v. Chandler,* 303 F. 2d 55, cert. den. 372 U.S. 915, Reh. den. 373 U.S. 906.

Respondent submits that the importance of the principle of detached, impartial judicial administration is an exceptional circumstance requiring the exercise of the Tenth Circuit's discretionary power to invoke the extraordinary remedies provided by Section 1651, *supra.*

The only other point made by Petitioner to which Respondent considers an answer may be necessary is the statement that Petitioner was never given the opportunity to rule on the question of his disqualification and that Texaco's petition in the Court of Appeals for a Writ of Mandamus was premature (Pet.

pp. 20, 21.)[9] It should be noted that in the *Occidental* case, the petition for a Writ of Mandamus on which the Court of Appeals acted was filed before the judge of the District Court (Petitioner here) had acted to disqualify himself, and in the *Ritter* case the petition for a writ of mandamus on which the Court of Appeals acted was filed after the judge of the District Court failed to act in accordance with the suggestion of the Court of Appeals in a previous decision in the case (257 F. 2d 920) that he "Take appropriate preliminary steps to the end that further proceedings in the case be had before another judge," stating that he did not "intend to follow that suggestion so you can lay that to one side" (273 F. 2d 32). In this case, respondent waited until it became clear that petitioner was either unwilling or unable to render a decision. In short, respondent did not act rashly but it did act timely.

Conclusion.

The Court of Appeals correctly ruled that the Petitioner was disqualified to sit on or try the *Hirschfield* case; that he proceed no further in the case and that all further proceedings in the case be heard and determined by a judge to be designated by the Chief Judge of the Court of Appeals.

The Court of Appeals' ruling does not conflict with any decision of this Court or any Court of Appeals.

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[9]Petitioner makes many statements which are not supported by record references. For example, see the references on p. 10 that Petitioner suggested to counsel that he transfer the *Hirschfield* case to one of his associates and the statements of respondent's counsel, Mr. Daugherty, in answer. Another example are the references to matters relating to the Order of the Judicial Council. Respondent has no knowledge of the record with regard to the Order of the Judicial Council of the Tenth Circuit which, of course is now moot. (*Supra*, p. 1 footnote 1.)

Nor does the Petition raise any important question of federal law or of judicial administration in the federal system warranting review.

Respondent, therefore, respectfully urges that the Petition be denied.

Respectfully submitted,

GEORGE W. JANSEN,
PHIL E. DAUGHERTY,

Attorneys for Respondent Texaco Inc.

Dated: February, 1966.